

No.

~~05-661 NOV 22 2005~~

IN THE

Supreme Court of the OFFICE OF THE CLERK
United States

OCTOBER TERM, 2005

BETTY LOREN-MALTESE,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AMY ADELSON*
NATHAN Z. DERSHOWITZ
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

* COUNSEL OF RECORD

Attorneys for Petitioner
BETTY LOREN-MALTESE

QUESTIONS PRESENTED

1. Is 18 U.S.C. § 1346, the called "honest services" statute, so vague on its face as to deprive a defendant of due process; and, if not, is it unconstitutional when applied to criminalize the conduct of a public official who did not receive any benefit from a fraud committed by others?

2. Does the RICO statute authorize a forfeiture award against a defendant who has not obtained, directly or indirectly, any proceeds from the racketeering activity, under a theory of joint and several liability?

3. Does Rule 803(8) of the Federal Rules of Evidence permit a court to exclude duly prepared, otherwise admissible, minutes of a governmental Board of Trustees meeting because the trial court determines they are self-serving of one defendant and, therefore, are untrustworthy?

4. Must a severance be granted under Rule 14 of the Federal Rules of Criminal Procedure if admission of evidence that falls within an exclusion to the hearsay rule and is critical to one defendant's right to present a defense violates the confrontation rights of a co-defendant?

PARTIES TO THE PROCEEDING

- In addition to the parties identified in the caption, the parties to the proceeding below are: Michael Spano, Sr., Michael Spano, Jr., Emil Schullo, Charles Schneider, John LaGiglio and Bonnie LaGiglio.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION OF THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
REASONS FOR GRANTING THE WRIT	6
I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE "HONEST SERVICES" STATUTE IS UNCONSTITUTIONALLY VAGUE AND TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW TO INTERPRET THE STATUTE SO THAT IT COMPLIES WITH DUE PROCESS	6

II.	CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER, UNDER A THEORY OF "JOINT AND SEVERAL LIABILITY," A DEFENDANT CAN BE SUBJECT TO RICO FORFEITURE WHEN THE DEFENDANT HAS NOT PERSONALLY OBTAINED PROCEEDS FROM THE R A C K E T E E R I N G ENTERPRISE	13
III.	CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE HEARSAY EXCEPTION FOR PUBLIC RECORDS PERMITS A COURT TO EXCLUDE GOVERNMENTAL MINUTES ON THE BASIS OF THE COURT'S DETERMINATION THAT THE MINUTES ARE "UNTRUSTWORTHY"	16
IV.	CERTIORARI SHOULD BE GRANTED TO REVISIT THE RULE OF <u>ZAFIRO v. UNITED STATES</u> AND TO RESOLVE WHETHER A COURT MUST GRANT A SEVERANCE WHEN ONE DEFENDANT'S CONSTITUTIONAL RIGHTS CONFLICT WITH A CO-DEFENDANT'S CONSTITUTIONAL RIGHTS	20

CONCLUSION 23

APPENDIX

Decision dated September 1, 2005 App. 1

TABLE OF AUTHORITIES

CASES

<u>Alexander v. United States</u> , 509 U.S. 544 (1993)	15
<u>Beech Aircraft Corp. v. Rainey</u> , 488 U.S. 153 (1988)	19
<u>Bruton v. United States</u> , 391 U.S. 123 (1968)	22
<u>City of Chicago v. Morales</u> , 527 U.S. 41 (1999)	12
<u>McNally v. United States</u> , 483 U.S. 350 (1987)	6, 8, 12
<u>Perrin v. Anderson</u> , 784 F.2d 1040 (10 th Cir. 1986)	19
<u>Rock v. Arkansas</u> , 483 U.S. 44 (1987)	21
<u>Taylor v. Illinois</u> , 484 U.S. 400 (1988)	21
<u>United States v. Bloom</u> , 149 F.3d 649 (7 th Cir. 1998)	9, 10
<u>United States v. Brumley</u> , 116 F.3d 728 (5 th Cir.) (en banc) <u>cert. denied</u> , 522 U.S. 1028 (1997)	7, 8, 10

<u>United States v. Burgos,</u> 55 F.3d 93 (4 th Cir. 1995)	7
<u>United States v. Cochran,</u> 109 F.3d 660 (10 th Cir. 1997)	9
<u>United States v. Corrado,</u> 227 F.3d 543 (6 th Cir. 2000)	14
<u>United States v. Edwards,</u> 303 F.3d 606 (5 th Cir. 2002), <u>cert. denied</u> , 537 U.S. 1192 (2003)	14
<u>United States v. Frost,</u> 125 F.3d 346 (6 th Cir. 1997), <u>cert. denied</u> , 525 U.S. 810 (1998)	9
<u>United States v. Fruchter,</u> 411 F.3d 377 (2d Cir. 2005)	14
<u>United States v. Genova,</u> 333 F.3d 750 (7 th Cir. 2003)	14, 15
<u>United States v. Giffen,</u> 326 F.Supp.2d 497 (S.D.N.Y. 2004)	9
<u>United States v. Gray,</u> 96 F.3d 769 (5 th Cir. 1996), <u>cert. denied</u> , 520 U.S. 1129 (1997)	7, 9
<u>United States v. Handakas,</u> 286 F.3d 92 (2d Cir.), <u>cert. denied</u> , 537 U.S. 894 (2002)	8
<u>United States v. Hausmann,</u> 345 F.3d 952 (7 th Cir. 2003), <u>cert. denied</u> , 541 U.S. 1072 (2004)	7

<u>United States v. Jackson-Randolph</u> , 282 F.3d 369 (6 th Cir. 2002)	19
<u>United States v. Lopez-Lukis</u> , 102 F.3d 1164 (11 th Cir. 1997)	10
<u>United States v. Margiotta</u> , 688 F.2d 108 (2d Cir. 1982), <u>cert. denied</u> , 461 U.S. 913 (1983)	10, 11
<u>United States v. Martin</u> , 195 F.3d 961 (7 th Cir. 1999), <u>cert. denied</u> , 530 U.S. 1263 (2000)	7, 10
<u>United States v. Martin</u> , 228 F.3d 1 (1 st Cir. 2000)	9
<u>United States v. Masters</u> , 924 F.2d 1362 (7 th Cir.), <u>cert. denied</u> , 500 U.S. 919 (1991)	14
<u>United States v. Murphy</u> , 323 F.3d 102 (3d Cir. 2003)	10
<u>United States v. Panarella</u> , 277 F.3d 678 (3d Cir.), <u>cert. denied</u> , 537 U.S. 819 (2002)	10
<u>United States v. Pennington</u> , 168 F.3d 1060 (8 th Cir. 1999)	9
<u>United States v. Rybicki</u> , 354 F.3d 124 (2d Cir. 2003) (en banc), <u>cert. denied</u> , 125 S.Ct. 32 (2004)	7, 8, 9
<u>United States v. Sawyer</u> , 85 F.3d 713 (1 st Cir. 1996)	7, 10

<u>United States v. Simmons,</u> 154 F.3d 765 (8 th Cir. 1998)	14
<u>United States v. Spano,</u> 421 F.3d 599 (7 th Cir. 2005)	1
<u>United States v. Sun-Diamond Growers of California,</u> 138 F.3d 961 (D.C. Cir. 1998), <u>aff'd in part</u> , 526 U.S. 398 (1999)	9
<u>United States v. Vinyard,</u> 266 F.3d 320 (4 th Cir. 2001), <u>cert. denied</u> , 536 U.S. 922 (2002)	9
<u>United States v. Warner,</u> 292 F.Supp.2d 1051 (N.D. Ill. 2003)	9
<u>United States v. Waymer,</u> 55 F.3d 564 (11 th Cir. 1995), <u>cert. denied</u> , 517 U.S. 1119 (1996)	7
<u>United States v. Welch,</u> 327 F.3d 1081 (10 th Cir. 2003)	7
<u>Washington v. Texas,</u> 388 U.S. 14 (1967)	21
<u>Zafiro v. United States,</u> 506 U.S. 534 (1993)	22

CONSTITUTION, STATUTES AND RULES

U.S. Const.,	
Amend. V	1
Amend VI	1, 21

in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered, ... shall be fined under this title or imprisoned, ... or both....

18 U.S.C. §1343 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned, . . . or both.

18 U.S.C. §1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. §1963(a)(3) provides, in pertinent part:

Whoever violates any provision of section 1962 ... shall forfeit to the United States....

any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

Rule 14(a) of the Federal Rules of Criminal Procedure provides:

If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Rule 803(8) of the Federal Rules of Evidence provides, in pertinent part, that "the following [is] not excluded by the hearsay rule...."

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report .. or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

STATEMENT OF THE CASE

On August 23, 2002, petitioner Betty Loren-Maltese was convicted of one count of RICO conspiracy, in violation of 18 U.S.C. §1962(d), and of five counts of wire and mail fraud, in violation of 18 U.S.C. §§1341, 1343 and 1346. The jury found that Loren-Maltese had a forfeiture interest in the sum of \$3,250,000. On January 9, 2003, Loren-Maltese was sentenced, among other things, to a term of imprisonment of 97 months.